

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PERFECT 10, INC.,

Plaintiff,

-against-

TUMBLR, INC.,

Defendant.

No. 12 Civ. 3552 (DLC)

ECF Case

ANSWER

JURY TRIAL DEMANDED

Defendant Tumblr, Inc. (“Tumblr”), by and through its undersigned counsel, for its Answer to the Complaint filed against it by Plaintiff Perfect 10, Inc. (“Perfect 10”), states as follows:

INTRODUCTORY STATEMENT

This case is the latest in a series of copyright infringement lawsuits brought by adult entertainment company Perfect 10 in its ongoing effort to extract settlements from innocent internet service providers (“ISPs”) not willing or able to afford defending themselves in protracted litigation. While Perfect 10 in its Complaint describes its business model as centered on a subscription website for distributing adult content, its CEO Norman Zada has openly admitted that Perfect 10 is actually just “a shell.” In fact, Perfect 10’s true business appears to be litigation. Specifically, Perfect 10 transmits large numbers of flawed, often unintelligible, and misdirected DMCA notices to ISPs, in the hope that the ISPs will slip up or otherwise be unable to process the notices—thereby giving Perfect 10 an opening to file suit and invoke the specter of massive, and potentially business-jeopardizing, statutory damages. Having worn out its welcome in California courts through the repeated rejection of its claims, Perfect 10 now appears to be shopping its theories in new forums, hoping to find a sympathetic ear. Indeed, Mr. Zada recently admitted that Perfect 10 dropped its prior case against another ISP in the Central District of California—which occurred just

days before Perfect 10 filed this action against Tumblr in New York—“because we did not feel we could win before this judge.”

Tumblr is Perfect 10’s latest unassuming target. Tumblr, a young company of slightly over 100 employees that was founded and is based in New York City, is one of the web’s fastest-growing platforms for creators and creative expression. Contrary to Perfect 10’s allegations, respecting and vindicating the rights of creators is a core tenet of Tumblr’s business. Tumblr vigorously disputes Perfect 10’s allegations, and is entitled to DMCA safe harbor on its claims, among its other defenses. Perfect 10’s meritless case should be rejected in full, and Tumblr should be awarded its attorney’s fees incurred in defending this suit.

INTRODUCTION

The Paragraph numbers below correspond to and answer those in Perfect 10’s Complaint. For each Paragraph, if an allegation is not explicitly admitted, it is denied.

1. Tumblr admits that Perfect 10 purports to bring the claims in its Complaint under the Copyright Act, 17 U.S.C. § 101. Paragraph 1 of the Complaint otherwise purports to set forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr denies such allegations.

JURISDICTION AND VENUE

2. Tumblr admits that Perfect 10 has brought the claims in its Complaint under the Copyright Act, 17 U.S.C. § 101, et seq. Tumblr further admits that this Court has subject matter jurisdiction over Perfect 10’s claims brought under the Copyright Act, 17 U.S.C. § 101, et seq. with respect to works for which Perfect 10 holds validly issued copyright registrations. Tumblr denies that this Court has subject matter jurisdiction over Perfect 10’s claims brought under the Copyright

Act, 17 U.S.C. § 101, et seq. with respect to works for which Perfect 10 does not hold validly issued copyright registrations. Tumblr denies the remaining allegations in Paragraph 2 of the Complaint.

3. Tumblr admits, for the purposes of this action only, that venue is proper in this Court.

4. Paragraph 4 purports to set forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr admits that it does business in New York City and this District, and denies the remaining allegations of Paragraph 4 of the Complaint.

THE PARTIES

5. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 5 of the Complaint and on that basis denies the allegations.

6. Tumblr admits that it is a Delaware Corporation, headquartered in New York City, and that its website may be found at the URL www.tumblr.com. Tumblr otherwise denies the allegations in Paragraph 6 of the Complaint.

7. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 7 of the Complaint and on that basis denies the same.

8. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 8 of the Complaint and on that basis denies the same.

9. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 9 of the Complaint and on that basis denies the same.

10. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 10 of the Complaint and on that basis denies the same.

11. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 11 of the Complaint and on that basis denies the allegations.

12. Tumblr admits that Exhibit 1 to the Complaint purports to be a table titled “Perfect 10’s Copyright Registrations.” Tumblr otherwise lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 12 of the Complaint and on that basis denies the same.

13. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 13 of the Complaint and on that basis denies the same.

14. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 14 of the Complaint and on that basis denies the same.

THE BUSINESS OF TUMBLR

15. Tumblr admits that its website, which may be found at the URL www.tumblr.com, is accessible in the United States and is on the World Wide Web. Tumblr lacks sufficient knowledge or information to form a belief as to whether its website is accessible throughout the world and on that basis denies the same. Tumblr otherwise denies the allegations contained in Paragraph 15 of the Complaint.

16. Tumblr admits that it is a platform that allows users to create blogs and to post content on those blogs; such content may be hosted by Tumblr or may be located, hosted, and/or

distributed by third-party websites or platforms. Tumblr otherwise denies the allegations in the first sentence of Paragraph 16 of the Complaint. The second sentence of Paragraph 16 sets forth conclusions of law for which no response is required.

17. Tumblr admits that it offers a feature called “reblog,” which allows users to display posts on their blogs that link back to posts that were created by other Tumblr users. Tumblr otherwise denies the description of the feature contained in Paragraph 17 of the Complaint, and further denies that it allows copyright infringement on its site; to the contrary, Tumblr’s Terms of Service contain the appropriate licenses from users to Tumblr to enable the “reblog” feature, require users to provide a representation that they have the rights to grant such licenses for any content they post, and otherwise explicitly prohibit copyright infringement. *See* http://www.tumblr.com/policy/en/terms_of_service. The remainder of Paragraph 17 of the Complaint sets forth conclusions of law for which no response is required, but to the extent a response is required, Tumblr denies such allegations.

18. Tumblr denies the allegations in Paragraph 18 of the Complaint.

19. Tumblr admits that Exhibit 2 purports to be a screenshot of a document bearing the URL “<http://jwander.tumblr.com/post/731602794/Isabelle-funaro>” at the bottom of the page. Paragraph 19 otherwise sets forth conclusions of law for which no response is required.

20. Tumblr denies the allegations in the first sentence of Paragraph 20 of the Complaint. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in the second sentence of Paragraph 20 of the Complaint and on that basis denies the same.

TUMBLR'S ACTIVITIES

21. Tumblr admits that its Community Guidelines state that it is Tumblr's "policy to respond to notices of alleged copyright infringement as per our Terms of Service and the Digital Millennium Copyright Act." See <http://www.tumblr.com/policy/en/community>. Tumblr denies the remaining allegations of Paragraph 21 of the Complaint.

22. Paragraph 22 of the Complaint sets forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr denies the allegations.

23. Tumblr admits that between September, 2011 and December, 2011, the email address "john@tumblr.com" received six emails which appeared to have been sent from the email address "normanz@earthlink.net". The remainder of Paragraph 23 of the Complaint sets forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr denies such allegations.

24. Tumblr admits that between September, 2011 and December, 2011, the email address "john@tumblr.com" received six emails which appeared to have been sent from the email address "normanz@earthlink.net". Tumblr denies that John Maloney was Tumblr's Designated Agent to receive DMCA notices as of December 25, 2011. Tumblr admits that Exhibit 4 purports to be a screenshot of a graphic titled "tumbrinc.pdf", but otherwise lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the second sentence of Paragraph 24 of the Complaint and on that basis denies the same. Tumblr otherwise denies the allegations in Paragraph 24 of the Complaint.

25. Tumblr denies the allegations of Paragraph 25 of the Complaint.

26. Tumblr admits that on or around September 28, 2011 the email address "john@tumblr.com" received an email which appeared to have been sent from the email address

“normanz@earthlink.net”. Tumblr further admits that Exhibit 5 purports to be a screenshot of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated September 28, 2011. Tumblr otherwise denies the allegations in Paragraph 26 of the Complaint.

27. Tumblr admits that on or around October 8, 2011, the email address “john@tumblr.com” received three emails which appeared to have been sent from the email address “normanz@earthlink.net”. Tumblr further admits that Exhibit 6 purports to be a screenshot of portions of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated October 8, 2011. Tumblr further admits that Exhibit 7 purports to be a screenshot of portions of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated October 8, 2011. Tumblr further admits that Exhibit 8 purports to be a screenshot of portions of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated October 8, 2011. Tumblr otherwise denies the allegations in Paragraph 27 of the Complaint.

28. Tumblr admits that on or around December 25, 2011, the email address “john@tumblr.com” received two emails which appeared to have been sent from the email address “normanz@earthlink.net”. Tumblr further admits that Exhibit 9 purports to be a screenshot of portions of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated December 25, 2011. Tumblr further admits that Exhibit 10 purports to be a screenshot of portions of an email from “normanz@earthlink.net” to “john@tumblr.com”, dated December 25, 2011. Tumblr otherwise denies the allegations in Paragraph 28 of the Complaint.

29. The first sentence of Paragraph 29 of the Complaint sets forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr denies such allegations. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the

allegations in the second sentence of Paragraph 29 of the Complaint and on that basis denies such allegations. Tumblr otherwise denies the allegations in Paragraph 29 of the Complaint.

30. The first sentence of Paragraph 30 of the Complaint sets forth conclusions of law to which no response is required, but to the extent a response is required, Tumblr denies such allegations. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the second sentence of Paragraph 30 of the Complaint and on that basis denies such allegations.

31. Tumblr admits that it has a policy of terminating the accounts of repeat infringers, and that it reasonably implements that policy. The remainder of Paragraph 31 of the Complaint sets forth conclusions of law for which no response is required, but to the extent a response is required, Tumblr denies such allegations.

32. Paragraph 32 of the Complaint sets forth conclusions of law for which no response is required, but to the extent a response is required, Tumblr denies such allegations.

FIRST CLAIM FOR RELIEF
(Direct Copyright Infringement Against Tumblr)

33. Tumblr hereby incorporates and realleges its responses to Paragraphs 1 through 32, above.

34. Tumblr admits that Exhibit 1 to the Complaint purports to be a table titled “Perfect 10’s Copyright Registrations.” Tumblr otherwise lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 34 of the Complaint and on that basis denies the same. Paragraph 34 also sets forth conclusions of law for which no response is required, but to the extent a response is required, Tumblr denies such allegations.

35. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 35 of the Complaint and on that basis denies the

same. Paragraph 35 also sets forth conclusions of law for which no response is required, but to the extent a response is required, Tumblr denies such allegations.

36. Tumblr denies the allegations in Paragraph 36 of the Complaint.

37. Tumblr denies the allegations in Paragraph 37 of the Complaint.

38. Tumblr denies the allegations in Paragraph 38 of the Complaint.

39. Tumblr denies the allegations in Paragraph 39 of the Complaint.

40. Tumblr denies the allegations in Paragraph 40 of the Complaint.

SECOND CLAIM FOR RELIEF
(Contributory Copyright Infringement Against Tumblr)

41. Tumblr hereby incorporates and realleges its responses to Paragraphs 1 through 40, above.

42. Tumblr lacks sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 42 of the Complaint and on that basis denies the same.

43. Tumblr denies the first sentence of Paragraph 43. Tumblr admits that for a period of time, John Maloney was its Designated Agent for receiving DMCA notices. Tumblr admits that Exhibit 4 purports to be a screenshot of an object titled “tumbrinc.pdf.” Tumblr otherwise denies the allegations in Paragraph 43 of the Complaint.

44. Tumblr admits that its Community Guidelines state that it is Tumblr’s “policy to respond to notices of alleged copyright infringement as per our Terms of Service and the Digital Millennium Copyright Act.” See <http://www.tumblr.com/policy/en/community>. Tumblr denies the remaining allegations of Paragraph 44 of the Complaint.

45. Tumblr denies the allegations in Paragraph 45 of the Complaint.

46. Tumblr denies the allegations in Paragraph 46 of the Complaint.

- 47. Tumblr denies the allegations in Paragraph 47 of the Complaint.
- 48. Tumblr denies the allegations in Paragraph 48 of the Complaint.
- 49. Tumblr denies the allegations in Paragraph 49 of the Complaint.
- 50. Tumblr denies the allegations in Paragraph 50 of the Complaint.

PRAYER FOR RELIEF

With respect to the WHEREFORE clause and subparagraphs (1) through (6) in the section titled PRAYER FOR RELIEF, Tumblr denies that Perfect 10 is entitled to any relief, including a judgment against Tumblr, actual damages, profits, statutory damages, an injunction, attorney's fees and costs, destruction of materials, or any other relief.

AFFIRMATIVE DEFENSES

By alleging the Affirmative Defenses set forth below, Tumblr does not agree or concede that it bears the burden of proof or the burden of persuasion on any of these issues, whether in whole or in part. These affirmative defenses incorporate by reference the factual allegations in Paragraphs 1-50 above. Tumblr reserves the right to amend its Answer to assert such additional defenses as may later become available or apparent to it.

**FIRST AFFIRMATIVE DEFENSE
(DMCA SAFE HARBORS)**

Perfect 10's claims are barred in whole or in part because Tumblr is protected by one or more of the DMCA Safe Harbors codified at 17 U.S.C. § 512.

**SECOND AFFIRMATIVE DEFENSE
(FAILURE TO STATE A CAUSE OF ACTION)**

Perfect 10's Complaint, and each cause of action within it, in whole or in part, fails to state a cause of action, including but not limited to, for any work not specifically identified in the Complaint.

**THIRD AFFIRMATIVE DEFENSE
(SUBJECT MATTER JURISDICTION)**

This Court lacks subject matter jurisdiction over claims to enforce copyrights for which Perfect 10 has not obtained, or have not pleaded ownership of, validly issued copyright registrations.

**FOURTH AFFIRMATIVE DEFENSE
(FAIR USE)**

Perfect 10's claims are barred, in whole or in part, by the doctrine of copyright fair use, 17 U.S.C. § 107.

**FIFTH AFFIRMATIVE DEFENSE
(ACTUAL AND IMPLIED LICENSE)**

Perfect 10's claims are barred, in whole or in part, by consent, acquiescence, and actual and/or implied license.

**SIXTH AFFIRMATIVE DEFENSE
(FREE SPEECH)**

Perfect 10's claims are barred, in whole or in part, by free speech rights guaranteed by the First Amendment to the United States Constitution and by the Constitution of the State of New York and other states.

**SEVENTH AFFIRMATIVE DEFENSE
(FAILURE TO MITIGATE)**

Perfect 10's claims are barred, in whole or in part, by their failure to mitigate damages, if any.

**EIGHTH AFFIRMATIVE DEFENSE
(SUBSTANTIAL NON-INFRINGEMENT USE)**

Perfect 10's claims are barred in whole or in part based on the doctrine of substantial non-infringing use, although Tumblr submits that Perfect 10 bears the burden of proving the doctrine's inapplicability.

**NINTH AFFIRMATIVE DEFENSE
(COPYRIGHT MISUSE)**

Perfect 10's claims are barred in whole or in part by the doctrine of copyright misuse.

**TENTH AFFIRMATIVE DEFENSE
(STANDING)**

Perfect 10's claims are barred, in whole or in part, for lack of standing to the extent they are based on alleged infringement of works for which Perfect 10 does not (or did not) own or control the exclusive right allegedly infringed at the time of infringement.

**ELEVENTH AFFIRMATIVE DEFENSE
(INVALID AND/OR UNENFORCEABLE CERTIFICATES)**

Perfect 10's claims are barred, in whole or in part, to the extent they are based on alleged infringement of works for which (i) valid and enforceable copyright registration certificates do not exist and/or (ii) the relevant certificates contain materially false and/or inaccurate information relating to the nature, ownership or chain of title to the work.

**TWELFTH AFFIRMATIVE DEFENSE
(LACHES)**

Perfect 10's claims are barred, in whole or in part, by the doctrine of laches.

**THIRTEENTH AFFIRMATIVE DEFENSE
(STATUTE OF LIMITATIONS)**

Perfect 10's claims are barred, in whole or in part, by relevant statutes of limitations.

**FOURTEENTH AFFIRMATIVE DEFENSE
(ESTOPPEL)**

Perfect 10's claims are barred, in whole or in part, by estoppel.

**FIFTEENTH AFFIRMATIVE DEFENSE
(UNCLEAN HANDS)**

Perfect 10's claims are barred, in whole or in part, by the doctrine of unclean hands.

**SIXTEENTH AFFIRMATIVE DEFENSE
(WAIVER)**

Perfect 10's claims are barred in whole or in part by the doctrine of waiver.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(DAMAGES: COPYRIGHT ACT)**

Perfect 10's claims for statutory damages and attorney's fees are barred, in whole or in part, by the Copyright Act, 17 U.S.C. § 412.

**EIGHTEENTH AFFIRMATIVE DEFENSE
(DAMAGES: EXTRA-TERRITORIALITY)**

Perfect 10's claims for damages, including for disgorgement of Tumblr's alleged profits, attributable to sales or other activities outside the United States are barred by reason of the Copyright Act's territorial limitations and by the lack of subject matter jurisdiction over such extra-territorial claims in proceedings under the U.S. Copyright Act.

**NINETEENTH AFFIRMATIVE DEFENSE
(LACK OF INJURY OR DAMAGE)**

Perfect 10 is barred from obtaining any relief from Tumblr in this action because Perfect 10 has suffered no injury or damage as a result of any act or conduct by Tumblr, and none of Tumblr's revenues or profits is attributable to its allegedly infringing conduct.

**TWENTIETH AFFIRMATIVE DEFENSE
(DAMAGES: INNOCENT INTENT)**

Perfect 10's damages, if any, are limited by Tumblr's innocent intent.

**TWENTY-FIRST AFFIRMATIVE DEFENSE
(DAMAGES: NO WILLFULNESS)**

Perfect 10's damages, if any, are limited by the absence of any willful conduct by Tumblr.

RELIEF REQUESTED

WHEREFORE, Defendants respectfully request the following relief:

1. A judgment in favor of Tumblr denying Perfect 10 all relief requested in its Complaint in this action and dismissing Perfect 10's Complaint with prejudice;
2. That Tumblr be awarded its costs of suit, including reasonable attorney's fees; and
3. That the Court award Tumblr such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Defendants hereby demand a trial by jury on all issues so triable in accordance with Federal Rule of Civil Procedure 38(b).

Dated: June 12, 2012
New York, New York

Respectfully submitted,
TUMBLR, INC.

s/ Rachel Herrick Kassabian
Rachel Herrick Kassabian
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
Email: rachelkassabian@quinnemanuel.com
Telephone: (650) 801-5000
Facsimile: (650) 801-5100

Todd Anten
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Email: toddanten@quinnemanuel.com
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

Attorneys for Tumblr, Inc.